FILED
United States Court of Appeals
Tenth Circuit

March 2, 2009

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: RICKY WAYNE NELSON, Movant.	No. 09-5020

ORDER

Before **KELLY**, **O'BRIEN** and **HOLMES**, Circuit Judges.

Movant Ricky Wayne Nelson, a federal prisoner proceeding pro se, has filed a motion for authorization to file a second or successive 28 U.S.C. § 2255 motion to vacate, set aside or correct his sentence. We deny authorization.

Mr. Nelson pleaded guilty in 2007 to possession of ammunition after a felony conviction. He was sentenced to ninety-six months' imprisonment. Mr. Nelson did not file a direct appeal, but he did file a § 2255 motion in June 2008, alleging that his trial counsel was ineffective because he did not file a motion to suppress evidence obtained pursuant to an allegedly defective search warrant. The district court denied the § 2255 motion, *United States v. Nelson*, No. 07-CR-0045-CVE (N.D. Okla. Aug. 19, 2008), and Mr. Nelson did not appeal. In February 2009, Mr. Nelson filed his motion seeking authorization to file a second § 2255 motion. He again seeks to claim his counsel was ineffective

for not filing a motion to suppress evidence obtained pursuant to the search warrant.

To obtain authorization to file a second or successive § 2255 motion, a federal prisoner must demonstrate that his proposed claims either depend on "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense," § 2255(h)(1), or rely upon "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," § 2255(h)(2). Mr. Nelson claims to have newly discovered evidence that the search warrant in question did not comply with state law.

In his first § 2255 motion, Mr. Nelson claimed the search warrant was invalid because it was issued on January 24, 2006, but not executed until February 3, 2007, in violation of state law requiring search warrants to be executed within ten days of issuance. The district court ruled that the search warrant was actually issued in January 2007, not 2006, and that the "2006" date on the search warrant was simply a scrivener's error. The court noted that the affidavit supporting the search warrant referenced events that occurred in late 2006, and that the contemporaneous police report stated the search warrant was issued on January 24, 2007. As noted, Mr. Nelson did not appeal that ruling.

Now, in his motion for authorization, Mr. Nelson argues he has newly discovered information that demonstrates the search warrant was not issued in 2007: a letter from a Tulsa County clerk attesting that she did not show a search warrant filed under Mr. Nelson's name in 2007. This letter is not, however, "sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [Mr. Nelson] guilty of the underlying offense." § 2255(h)(1).

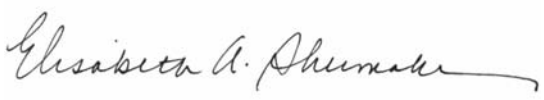
First, the fact that the court clerk was did not show a copy of the search warrant under Mr. Nelson's name does not demonstrate that the search warrant was not issued. There is no evidence that the court retains such records or indicating how such records are filed or stored. Second, as noted by the district court, the affidavit for the search warrant references facts and events that occurred in late 2006, namely, the missing person being investigated by the police had been missing since October 31, 2006; she was reported missing to police on November 5, 2006; Mr. Nelson told police he last saw the missing person on November 5, 2006; and witnesses told police Mr. Nelson had punched the missing person on October 15, 2006. Given this, the affidavit for the search warrant could not have been issued in January 2006. Third, the contemporaneous police report states the search warrant was issued on January 24, 2007. Finally, the 2006 date on both the affidavit for the search warrant and the search warrant was printed on

the form, not hand-written, so it is reasonable to surmise that the signatories failed to correct the printed 2006 date when they signed it in January 2007.

Accordingly, Mr. Nelson's evidence is not sufficient to establish by clear and convincing evidence that the search warrant was invalid, and thus, that counsel was ineffective for not moving to suppress the warrant. Because Mr. Nelson cannot carry the lesser burden of establishing his counsel was ineffective, he cannot carry the greater burden of making a prima facie case that no reasonable factfinder would have found him guilty of the offense.

Authorization is DENIED and this matter is DISMISSED. This denial of authorization is not appealable and "shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court,



ELISABETH A. SHUMAKER, Clerk